NTSB Order No.
EM-139

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 3rd day of February, 1987

PAUL A. YOST, Commandant, United States Coast Guard

v.

EDWARD V. MURPHY, Appellant.

Docket: ME-122

OPINION AND ORDER

Appellant challenges a March 3, 1986 decision of the Vice Commandant (Appeal No. 2419) affirming a suspension of his merchant mariner's license (No. 516721) for two months outright and for an additional two months on eight months' probation. The suspension was ordered by Coast Guard Administrative Law Judge Rosemary A. Denson on May 17, 1985 following an evidentiary hearing on February 20, 1985.[1] The law judge had sustained a charge of negligence on a specification alleging that the appellant, while serving on January 6, 1985 as Operator aboard the M/V JOE BOBZIEN "did navigate [his] tow in such a manner as to cause [his] tow to collide with the fleeted barges" on the left descending bank of the Ohio River at miles 808.5. On appeal to the Board, appellant contends, among other things, that the evidence of record establishes without contradiction that notwithstanding the collision he exercised reasonable care in the navigation of his vessel.[2] For the reasons that follow, we agree and will, therefore, reverse the finding on negligence and the suspension of appellant's license.

The record reveals that during the course of it voyage toward Cairo, Illinois the JOE BOBZIEN and its tow of 21 barges held up in Henderson Harbor in the early morning of January 6, 1985 in order

[1]Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

[2]The Coast Guard has filed a reply brief opposing the appeal.

to pick up additional barges.[3] Although the trip down the river had been interrupted by encounters with fog and fog was forecast to be in the area through most of the morning, visibility in the harbor was good when appellant arrived. With appellant holding his vessel and tow in position against the current in the river channel, a tug, the M/V CAN DO, initiated an attempt to bring a barge out appellant's flotilla from the fleet moored along the shore. However, before this barge transfer could be completed, a blanket of fog moved in from the shore and reduced visibility to zero. The tug aborted the transfer effort and returned to the barge fleeting area. Appellant, without visual reference to the shore, could not for long accurately fix his position in the channel.[4] He therefore determined that his flotilla presented a hazard to the barge fleet and various shoreside facilities and that he should move his vessel and tow to a safe location farther down river. During this movement in the fog appellant's tow struck a moored barge, and damage to two barges was sustained.

The parties agree that the collision of appellant's tow with the barge created a presumption of negligence in his navigation of the JOE BOBZIEN. However, the Coast Guard does not agree the appellant's evidence was sufficient to rebut the presumption. We do.

The Coast Guard maintains that it utilizes a reasonable care standard in cases of this type and denies appellant's contention that it requires a seaman to produce evidence exonerating himself in order to rebut the presumption of negligence. It asserts, however, that appellant did not rebut the presumption in this instance because he "did not demonstrate that he did all that reasonable care required" (C.G. reply at 5).[5] We share appellant's

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[3]The overall length of appellant's tow and towboat was about 1160 ft. and the width was 175 ft.

[4]Appellant testified that due to, among other things, the topography of the river's banks in this area, his radar could not be reliably used to determine the position of his vessel and tow relative to the shoreline.

[5]Appellant contends that the "correct standard, or measures of persuasion, necessary to rebut this `presumption', is, always has been, a showing of `reasonable care' on the part of the mariner. It requires credible evidence that the mariner acted prudently under the prevailing circumstances, according to accepted standards of good seamanship. Standing aline, and uncontradicted, such evidence must prevail, and the presumption

view that the Coast Guard is not applying a reasonable care standard with respect to the presumption if appellant must show not only that he acted reasonably, but also that there was nothing else he reasonably could have done to prevent the collision. If the Coast Guard's position were accepted, the presumption would shift to the seaman not just the burden of showing that the collision could have occurred due to a factor or factors other that negligent navigation, but also the burden of disproving that he had been negligent. Since the ultimate burden of proof on its charge against a seaman remains continuously with the Coast Guard notwithstanding any presumption of negligence, a credible, non-fault explanation for a collision defeats the presumption and obligates the Coast Guard to go forward with evidence to counter the seaman's explanation or to show that he was nevertheless guilty of some specific act of negligence.[6] The Coast Guard introduced no such evidence in this proceeding.[7]

The appellant testified that in his judgement the interests of

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is negated." Brief at 7. We think appellant has accurately stated the standard.

[6]Rule 301 of the Federal Rules of Evidence is instructive in this connection:

"Rule 301. Presumptions in General in civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

[7]The appellant suggests that the reason the Coast Guard relies so heavily, or even exclusively, on the presumption on negligence in cases of this kind is that the "investigation" of a vessel collision with a fixed object ends on the collection of sufficient evidence to establish the fact of the collision. In other words, there is no effort to ascertain whether the incident genuinely reflected on the operator's navigational abilities. If the Coast Guard's investigations are in fact so abbreviated, they would not appear to comport with the remedial purposes of these proceedings, which is "to help maintain standards for competence and conduct essential to the promotion of safety at sea." See 46 CFR § 5.5 (1985).

safety dictated that once he was engulfed in zero visibility fog he should move his vessel and tow away from the fleet and shoreside facilities in the immediate area, which included an oil loading dock, to a secure location farther down the river. The captain of the harbor tug CAN DO testified on behalf of the appellant and endorsed his judgment in the matter, indicating that appellant "had no other alternative with the size of the tow he had" (Tr. at 159).

The Coast Guard advance no evidence to suggest either that appellant's decision to move his vessel and tow was inappropriate or that his actual handling of the vessel was in any respect deficient.[8] Moreover, the Coast Guard produced no evidence that, given weather conditions observed and forecast for the day in question, appellant knew or should have known that the fog in the area could obscure the river so quickly and completely that he would not be able to navigate his vessel safely in the event the fog moved in while a barge transfer operation was underway; or that, given the lack of visibility, the posting of a lookout at the head of the tow before moving the vessel was advisable.

Notwithstanding the absence of evidence on these issues, the law judge concluded that appellant had not acted prudently because he had "gamble[d] with the fog which he could see was on the way" and because appellant did not "after getting his vessel and tow into this predicament, have a proper lookout" (ALJ Decision at 11). While the law judge's conclusions in this respect might have validity if there were record support for them, they cannot stand up in a proceeding in which there is no evidence: that appellant should have anticipated the movement of the fog across the harbor; that such fog would occur so quickly and be so dense as to preclude the completion of a safe barge transfer; or that the failure to use a lookout in these circumstances was contrary to any applicable standard of care.[9] Without evidence on these matters, the law judge opinion that appellant was negligent, inter alia, for not

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[8]The Vice Commandant asserts in his decision (at p. 8) that a master "will be held liable for any damage" if he "continues to navigate his vessel knowing that dense smoke or fog will prevent his lookouts from keeping an adequate watch...." We perceive no applicability in this assertion to the facts of this case. Appellant did not navigate into the fog, the fog moved in while appellant's vessel was essentially in a stationary position. The purpose of the movement of the vessel thereafter was to seek refuge from the fog, not to "continue" a navigation through it.

[9]In fact, the only evidence on the issue of posting a lookout at the head of the tow suggested that doing so in the visibility conditions that existed would have placed him at risk.

avoiding in the first place a situation that might subsequently jeopardize the safe navigation of his vessel provides no basis for sustaining the charge against him.[10]

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is granted, and

2. The order suspending appellant's marine license is reversed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER AND NALL, Members of the Board, concurred in the above opinion and order.

[10]The Board has twice previously noted this law judge's propensity to base negligence finding on personal opinions unsubstantiated by evidence introduced by the Coast Guard. See Commandant v. McDowell, NTSB Order EM-132, ap pp 6-7 (1986) and Commandant v. Dougherty, NTSB Order EM-140, at p.5 (1986).